No. 11,102

United States Circuit Court of Appeals

For the Ninth Circuit

BEN LIEBMAN, also known as B. Liebman, MASSACHUSETTS BONDING AND INSURANCE COMPANY (a corporation),

Appellants,

vs.

UNITED STATES OF AMERICA for the use and benefit of California Electric Supply Company (a corporation),

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Appellee's Brief on Appeal

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CORRECTED STATEMENT OF FACTS

While it is not the intention of appellee, California Electric Supply Company, to discredit the honesty of purpose of appellant herein in stating the facts set forth in his brief on appeal, which on the whole fail to conform

not from commission, but rather omission, we feel it incumbent to point out the following errors and corrections.

On page 4 of appellant's brief on appeal, appellant refers to Liebman's performance bond; this, in fact, was a payment bond. (Tr. 7)

On page 4 of the brief appellant refers to the filing of a "Notice to Withhold Payment," but neglects to add "and Verified Claim" as appears from plaintiff's "Exhibit 11." (Tr. p. 65)

On page 5 of appellant's brief again service of a "Notice to Withhold" is mentioned, but again appellant neglects to mention "Verified Claim." As appears from plaintiff's "Exhibit 11" (Tr. p. 65) the two are part and parcel of the same document.

Then on page 6 of appellant's brief, appellant's statement, "Apparently confident of his legal position that his client's claim was a preferred one, and in order to avoid further effort in its collection," is obviously a conclusion and finds no validity in a statement of facts.

To clarify the second paragraph on page 5 of appellant's brief, it should be added that, "the referee in bankruptcy ruled that Ben Liebman did owe the estate of Aetna Electric Company, bankrupt." (Tr. p. 45)

With reference to paragraph 3, page 9 of appellant's brief, in fairness to appellee it should be added, "that at the same time of the appeal from the referee's ruling to the Federal District Court, and simultaneously therewith, this present suit was filed."

With these few proposed corrections, the statement of facts meets with appellee's approval.

SUMMARY OF ARGUMENT

That appellee has performed all acts and has done all things required by the Miller Act to sustain its claim and this action.

That there can be no estoppel or waiver of appellee's rights without a clear showing by appellant of injury, deception, fraud, gain or prejudicial change of position, and failing this, there is only one conclusion possible—the judgment of the District Court should be sustained—appellee's right to recovery of *payment in full,* as guaranteed in the Miller Act, should be approved.

ARGUMENT

Appellee, California Electric Supply Company, having filed and served its verified claim on appellants (Tr. pp. 33 and 34) within the time limitation as provided by the Miller Act, Title 40, Chapter 3, United States Code Annotated, Sec. 270 B, providing that a materialman, the relationship of appellee, who has not been paid *in full* (Miller Act, Sec. 270 B) for materials furnished or labor supplied, shall have the right to sue on the *payment bond,* furnished on said government contract, for the balance unpaid at the time of institution of suit.

Plaintiff's and appellee's rights to sue on the payment bond having been perfected by meeting all of the requirements and specifications of the Miller Act, to-wit:

> Appellee not having received payment *in full* within ninety days of the furnishing of the last materials on the public housing project (Tr. p. 32); and

> Appellee having caused to be served within the ninety day period, a verified claim of money due, on appellants. (Tr. p. 35)

The legal and inevitable conclusion of this action in the District Court was judgment for appellee and against appellants, Jeannette Liebman, administratrix of the estate of Ben Liebman, also known as B. Leibman, Deceased, and the Massachusetts Bonding and Insurance Company, jointly and severally, for the full amount owing to appellee, the sum of $1,438.52 (Tr. p. 21), to be reduced by amounts received from bankrupt estate of Aetna Electric Company.

Appellant apparently does not seriously contend that appellee's rights are not clearly within the provisions of the Miller Act. True, appellants do in Paragraphs "B" and "E" of their brief, pages 16 and 27, devote some time and space to a discussion of a "Notice to Withhold," a futility which a closer reading of the Miller Act would correct. Under the Miller Act a "claim" is the only notice the contractor is entitled to and the materialman required to give.

Unless some new factor such as estoppel or waiver exists as contended by appellants by reason of the stipulation (Tr. p. 16) the judgment of the District Court seems inescapable.

The generally recognized elements of estoppel are succinctly set forth in American Jurisprudence, Vol. 19, Sec. 42 at p. 640. They are as follows:

> "1. Conduct of the party to be estopped which amounts to a false representation or concealment of material facts.

2. Expectation that such conduct shall be acted upon by the other party.

3. Knowledge, actual or constructive, of the real facts."

And on the part of the party claiming the estoppel:

"1. Lack of knowledge and of means of knowledge of the truth as to the facts in question.

2. Reliance on the conduct of the party estopped.

3. Action based thereon of such a character as to change his position prejudicially."

And in Section 43 of the same chapter, book and volume, it is stated:

"The doctrine of estoppel in pais must be applied strictly and should not be applied unless substantiated in every particular."

Applying this yardstick to the relationship and dealings of appellant and appellee, we are forced to the conclusion that none of these elements are present.

Appellant was as conversant with the facts as was the appellee, and there was never any attempt on appellee's part to conceal anything. Appellant at all times had the advice and counsel of an attorney. (Tr. p. 55) The meaning, terms and legal effect of the stipulation are clear and unambiguous, and the duties imposed therein are clear cut and unequivocal—no advantage was attempted, nor was any gained.

Appellant, Ben Liebman, did not change his position prejudicially by reason thereof; he was at all times legally bound to pay the money into the bankruptcy court, and by so doing he avoided the expenses and annoyance of a suit. (Tr. p. 40).

In the case of *Barnett v. Kemp,* 258 Mo. 139, the court therein, in considering a similar situation, stated as follows:

> "Estoppel cannot be based upon representations which tend only to induce a party to do some act which he is already legally bound to do."

And again, in the case of *United States v. Dunn,* 268 U.S. 121, and also in the case of *Hammond v. Tate,* 83 Fed.(2nd) 69, this rule was stated:

> "There can be no estoppel where there is no loss or injury, damage or prejudice to the party claiming it."

Appellant's discussion of the effect of the "Notice to Withhold" in paragraphs "B" and "E", pages 16 and 27 of his brief, finds absolutely no legal justification.

The Miller Act does not require or provide for a "Notice to Withhold" and the effect of such a notice was an absolute nullity. Appellant by reason thereof cannot claim deception; he is presumed to know the law and had the advice of attorneys at all times. The "Notice to Withhold" neither required appellants to act or prohibited them from acting in any way they saw fit.

The terms of the stipulation are clear and unequivocal and cannot be changed by interpretation or conjecture. There is no need for extraneous factors to aid in interpretation; nothing needs to be resorted to other than the document itself for the purpose of clarity.

In Vol. 25 A.L.R. 179, a host of authorities are cited in support of the rule that "estoppels are never based upon conjecture."

In the present case the appellant would have the appellee estopped from enforcing a statutory right and privilege by stipulation, which document did not even name or refer to that obligation. The only one referred to is the one existing between Aetna Electric Company and Ben Liebman. (Tr. p. 17) We agree that the acts and things done pursuant to said stipulation did satisfy the Aetna Electric Company's claim, but this had nothing to do with the legal obligation as provided by the Miller Act to insure payment *in full* to appellee, a materialman. Appellee's conduct at no time ever deceived the appellant, nor did its proceedings before the Bankruptcy Court in the Aetna bankruptcy estop it from proceeding under the bond.

The principal "that a materialman may prove his claim in the bankruptcy of either the contractor or subcontractor, and in no wise be precluded from proceeding under the payment bond" has been established and followed in these cases:

U. S. for use and benefit of the United States Rubber Co. v. Ambursen Dam Co., 3 Fed. Supp. 548;

Title Guaranty & Supply Co. v. United States to use of General Electric Co., 187 Fed. 98;

United States for use and benefit of John Davis v. Illinois Surety Co., 226 Fed. 653.

Courts have long ago established, supported and followed the principal that, estoppel always presupposes error on one side and fault or fraud upon the other, of which it would be inequitable for one party to take advantage.

Morgan v. Chicago A. R. Co., 96 U.S. 716.

In the principal case we have no error, advantage, fraud, fault or deception.

In the case of *Carpy v. James Dowdell, et al.,* 115 Cal. 677, the principal was enunciated, "where both parties have knowledge of all the facts, there can be no estoppel."

In the present case there is some confusion as to who drew the stipulation (Tr. pp. 48 and 57) and while not important, it has been stressed by appellant, and for that reason deserves consideration. It must be assumed that appellant, Ben Liebman, knew his legal duties. He knew that by turning over the money to the bankruptcy court he alone benefited by saving himself the expense and annoyance of a suit that was bound to be adverse. While the stipulation did fail to provide for everything he desired, i.e., a receipt, estoppel and waiver, as is now claimed for it, he was in no position to bargain for anything more. Appellee had nothing to gain or lose other than the desire to bring proceedings to a climax—to waive anything would be a voluntary gift.

Appellee spared neither time nor expense in attempting to perfect his claim of priority before the Bankruptcy Court, the success of which certainly would have redounded to appellant's benefit. Success did not attend appellee's efforts in the bankrupty court; the legal effect of that decision was to relegate it to the present proceedings under the Miller Act. Certainly the appellant cannot now be heard to say that appellee was guilty of lack of good faith, abuse of confidence or deception.

Appellants in paragraph "C" of their brief, have spread their hand on the table, so to speak, and figuratively propose that some one else pick out the cards that will

win for them. Answering becomes at once onerous and laborious.

I think we can admit that the stipulation is a receipt. We never have denied, and do not now deny, that the Trustee in Bankruptcy received the $1,438.52. Perhaps of all the things claimed for it, the stipulation is, in the final analysis, only a receipt for the money paid to the Trustee.

Waiver, being a more common defensive maneuver, is probably deserving of more specific treatment. Being a defensive last resort, so to speak, the courts have adopted clearly defined rules, the cardinal one of which is as follows:

> "To make a case of waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. A waiver to be operative must be supported by an agreement founded on a valuable consideration."
>
> *United Fireman's Ins. Co. v. Thomas,* 82 Fed. 406.

As we have seen, no vestige of benefit or profit ever accrued to appellee from appellant.

> "The burden is upon the party claiming a waiver to prove it by such evidence as does not leave the matter doubtful or uncertain."
>
> *Aronson v. Frankfort Accident and Plate Glass Ins. Co.,* 9 Cal. App. 473.

In the following California case the Supreme Court stated the principal very cryptically. It said:

> "Waiver is the intentional relinquishment of a known right after knowledge of the facts and always rests upon intent."
>
> *Wienke v. Smith,* 179 Cal. 220.

In the principal case neither appellee's conduct or the written stipulation, directly or indirectly, either waived, or estopped it from the present proceedings under the Miller Act.

The courts have established the rule that Title 40, Chapter 3, United States Code Annotated, Sec. 270 B, is highly remedial and should be construed liberally, and technical rules otherwise protecting sureties from liability are not applied in proceedings under said section.

U. S. for use and benefit of Jones Contracting Co. v. Skilken, 53 Fed. Supp. 14.

CONCLUSION

All of the acts and things done, steps taken by appellee throughout the extended negotiations, and subsequent legal proceedings, respecting this claim for $1,438.52, were made necessary in order that appellee protect and secure his right to *payment in full* guaranteed it under the Miller Act. That right to *payment in full* still exists, there never having been any satisfaction, nor estoppel to enforce it, or waiver of it, either directly, indirectly, by inference or construction. The stipulation is silent upon the rights guaranteed under the Miller Act. No fair, unbiased interpretation of its clear unambiguous terms could preclude appellee from an insistence of his rights under said act. The Miller Act, or any waiver of rights secured thereby, was never discussed in connection with the stipulation (Tr. p. 55), and no inference can be assumed.

There being present no estoppel, waiver or satisfaction of the rights secured by the Miller Act, appellee respect-

fully submits that the judgment of the District Court should be sustained. Appellee is not requesting that his debt be paid twice as appellant contends, but rather that it be paid *in full* as the law in such instances guarantees.

Dated, San Francisco, California,
December 20, 1945.

Respectfully submitted,

Edward T. Mancuso,
Leslie M. Julian,
Attorneys for Appellee.

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APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

THE CASES CITED BY APPELLEE CONTAIN ONLY GENERAL EXPRESSIONS OF LAW AND IN NO MANNER ATTEMPT TO REFUTE THE ARGUMENTS ADVANCED BY APPELLANTS IN THEIR OPENING BRIEF.

In our opening brief we contended in argument "B" (pp. 11, 16-18) that defendant Liebman by complying with the terms of the stipulation and by paying $1438.52 to the trustee in bankruptcy as directed by plaintiff, fully extinguished his obligation to plaintiff.

This argument was supported by pertinent legal citations at page 18 of our opening brief. No attempt has been made by appellee in its reply brief to show that these citations are inapplicable or without merit. A reply to the language of California Civil Code Section 1476 has been studiously avoided for the reason that under the facts of this case Liebman, having paid the debt due his creditor (appellee herein) in the manner directed by appellee, extinguished his obligation. The language of Civil Code Section 1476 and the other authorities in our argument "B" is so controlling in the instant case it is easily understandable why the appellee's reply consisted merely of a reference thereto at page 6 of its reply brief to the effect that our argument "finds absolutely no legal justification". Such a reply, in our opinion, is in effect an implied admission that argument "B" cannot be answered.

APPELLEE HAS FAILED TO MEET APPELLANTS' CONTENTION THAT APPELLEE'S ACTS IN THE PREPARATION OF THE STIPULATION AND ITS CONDUCT IN SECURING ITS EXECUTION AND COMPLIANCE MISLED THE APPELLANTS TO THEIR PREJUDICE AND THAT SUCH ACTS AND CONDUCT HAVE CREATED AN ESTOPPEL.

We contended in argument "C" of our opening brief (pp. 12, 19-22) that the acts and conduct of appellee in urging Liebman to execute the stipulation and pay the "earmarked" $1438.52 to the trustee created an equitable estoppel and a waiver of the benefits of the Miller Act. Appellee's reply to these contentions starts at page 4 of its brief on appeal.

We concede that the generally recognized elements of estoppel are as set forth at pages 4 and 5 of appellee's brief on appeal. However, we cannot agree with its argument at the bottom of page 5, first, that Liebman "did not change his position prejudicially to himself by paying the money over to the Bankruptcy Court"; second, that Liebman "was at all times legally bound to pay the money into the Bankruptcy Court"; and third, "By so doing he avoided the expenses and annoyance of a suit".

Our answer to the foregoing is:

First: Having paid the money over to the Bankruptcy Court and having thereafter incurred a judgment for the same amount, less a credit, can this be anything but prejudice to Liebman's purse?

Second: Liebman or his surety could have ignored the demands of the trustee in bankruptcy and paid directly to the materialman, the appellee herein, and would thereupon have become subrogated to the rights of the materialman in the bankruptcy estate.

American Bonding Co. of Baltimore v. Central Trust Co. of Illinois, 240 Fed. 400;

In re Scofield Co., 215 Fed. 45;

U. S. Fidelity & Guaranty Co. v. Sweeney, 80 Fed. (2d) 235.

Third: Instead of avoiding the expenses and annoyance of a suit, appellants have become obligated to pay the sum in dispute twice and have, in addition, incurred the expenses and annoyance of this litigation.

The case of

Barnett v. Kemp, 258 Mo. 139,

is cited by appellee, with the following excerpt therefrom:

> "Estoppel cannot be based upon representations which tend only to induce a party to do some act which he is already bound to do."

Our answer to this language is already contained in the hereinabove citations holding that the appellants herein were not bound to pay the money into the Bankruptcy Court, but could have paid the materialman directly.

The next citation of authority by appellee, at page 6 of his brief, is from

United States v. Dunn, 268 U. S. 121,

and contains the following excerpt:

> "There can be no estoppel where there is no loss or injury, damage or prejudice, to the party claiming it."

Once again we must declare that to our minds payment of an obligation twice most certainly represents injury, damage or prejudice.

Appellee's concluding citation relating to estoppel declares that in Vol. 25 *A. L. R.* 179 a host of authorities are cited in support of the rule that "estoppels are never based upon conjecture".

We have read the annotation embodied in this citation and the estoppel discussed therein related to the delay of a bank depositor in notifying a bank of a

forgery. The annotation contains no authorities even remotely applicable to the issues herein.

Our argument "C" was supported by the case of

United States for the Use and Benefit of Noland Company v. Wood, 99 Fed. (2d) 80,

which holds that the doctrine of equitable estoppel is universally recognized by the Courts and that this doctrine can be applied in actions under the Heard Act (Miller Act). This decision also holds that to establish equitable estoppel it is not necessary that actual fraud be shown, but that it is only necessary to show that the person estopped by his statements or conduct misled another to his prejudice. (Appellants' Op. Br. pp. 20-22.) It is our belief that this Honorable Court would welcome some argument on the part of the appellee to show, if it is all possible, why the foregoing cited cases is inapplicable to the present case on appeal. The authorities cited in our argument "C" should not be by-passed by a five line statement such as contained in appellee's brief on appeal at pages 8 and 9, and we take the liberty to quote:

> "Appellants in paragraph C of their Brief, have spread their hand on the table, so to speak, and figuratively proposed that someone else pick out the cards that will win for them. Answering becomes at once onerous and laborious."

Appellee does not contend that argument "C" is frivolous, but states that to answer argument "C" would involve too much labor and would be a burden.

APPELLEE CANNOT NULLIFY THE TERMS OF THE STIPULATION WHICH IS A CONTRACT BETWEEN THE PARTIES, BY CONTENDING THAT THE MILLER ACT INSURES PAYMENT IN FULL TO A MATERIALMAN.

The whole crux of appellee's argument is set out in one sentence at page 7 of his brief. We quote:

> "In the present case the appellant would have the appellee estopped from enforcing a statutory right and privilege by stipulation which document did not even name or refer to that obligation."

By this language, appellee concedes that even though by the terms of the stipulation it was mutually agreed that Liebman should pay the money to the trustee, as suggested by the appellee, full compliance with this agreement did not constitute a waiver by the appellee of the provisions of the Miller Act.

The import of this statement is startling. Appellee, in effect, argues that under the Miller Act it had a statutory right to full payment of the sum due it and therefore could not be deprived of that right, even though it had waived it by written stipulation. The further implication is obvious. That is, appellee's written contract as evidenced by the stipulation is to be disregarded and the rights given it under the Miller Act and waived by the stipulation are to be revived. This revival, of course, to take place after Liebman has in good faith acted in conformance with the terms of the stipulation and paid his money over to the trustee in bankruptcy.

We will state the proposition a little more boldly. After prevailing upon Liebman to execute the stipula-

tion and pay the money, it tells Liebman, in substance, that the stipulation or agreement between them was a nullity and that it wants him to again pay the $1438.52. To our minds, the disregard by the appellee of the sanctity that surrounds a written instrument mutually entered into cannot be explained or justified by the assertion by the appellee that it is the possessor of a statutory right entitling it to payment.

We have no quarrel with the authorities cited at page 7 of appellee's brief to the effect that a materialman may prove his claim in the bankruptcy of either the contractor or subcontractor and still not be precluded from proceeding under the payment bond. In the three cases cited by appellee there was not involved a stipulation such as entered into by the parties hereto and for that reason the appellee's citations are of no material advantage in arriving at a just determination of the issues herein.

In further justification of its position, appellee argues at page 7 of its brief that "estoppel always presupposes error upon one side and fault or fraud upon the other, of which it would be inequitable of one party to take advantage", and then, at the top of page 8 declares, "In the principal case we have no error, advantage, fraud, fault or deception".

In answer to these contentions we most respectfully direct this Honorable Court's attention to argument "C", pages 19 to 22 of appellants' opening brief, and particularly to the case of

United States for Use and Benefit of Noland Co. v. Wood, 99 Fed. (2d) 80, at page 83, wherein it was said:

> "An estoppel may be prejudiced on representations not made with fraudulent intent, if they are of such a character as to induce a reasonably prudent man to believe that they were intended to be acted upon. (Citations.)"

Appellee also cites the case of

Carpy v. James Dowdell et al., 115 Cal. 677, with the statement that the Court enunciated the principle "where both parties have knowledge of all the facts there can be no estoppel".

We believe the additional language from *Carpy v. James Dowdell,* at pages 686 and 687, is also apropos:

> "The principle of equitable estoppel is aptly and concisely stated by the supreme court of the United States in the opinion of Mr. Justice Clifford in Swain v. Seamens, 9 Wall. 274, in language that has since been frequently quoted and approved, as follows: 'Where a person tacitly encourages an act to be done he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim'; and the case at bar is not only within that principle, but is a much stronger case than one where a party only 'tacitly encourages' an act to be done. In Dickerson v. Colgrove, 100 U. S. 580, the United States supreme court states the principle as follows: 'The vital principle is that he who by his language or conduct leads

another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.' "

There is set out at page 9 of appellee's reply brief excerpts from three cases defining "waiver". We do not dispute the general rules as declared in these excerpts. We do contend, however, that even under *Wienke v. Smith,* 179 Cal. 220, cited by appellee, the appellee intentionally relinquished its rights under the Miller Act and intended to resort to the stipulation and the consequent earmarking of the funds in the trustee's hands to effect a speedy collection of its claim. Appellee had its choice to pursue its claim under the Miller Act or to proceed under the stipulation. It relinquished its rights under the Miller Act the moment the stipulation was executed.

CONCLUSION.

We repeat that the language of the stipulation, the acts and conduct of the parties hereto in reliance of its provisions and the recognition given to the stipulation by counsel for appellee, taken in the aggregate, can only lead to the conclusion that as a matter of law and equity an estoppel has been created which forever precludes appellee from asserting any right under the Miller Act.

The situation presented in this case of a man being requested to sign an agreement as represented by the stipulation and to pay his money in reliance thereon and to be thereafter virtually told the agreement is a nullity and that he was foolhardy in parting with his funds, cannot in law, equity, conscience, fair-dealing, or what you will, be defended by the claim that the Miller Act is a special surety right.

It is therefore most respectfully submitted that for the foregoing reasons the judgment of the lower Court should be reversed.

Dated, San Francisco, California,
January 4, 1946.

JOSEPH C. HAUGHEY,
Attorney for Appellants.